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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 5955

JAMES DAILY BRIGGS,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

REPLY OF STATE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

MAY IT PLEASE THE COURT:

The petitioner, James Daily Briggs, seeks a review by this Court of a judgment and opinion of the Court of Criminal Appeals of Tennessee entered January 5, 1970. The opinion is unreported but, as stated by counsel for the petitioner, is set forth in Appendix, pages 3a-10a, to the petition.

JURISDICTION

Counsel for the State does not challenge the jurisdiction of this Court to review the opinion designated above.

QUESTIONS PRESENTED

The questions presented in the petition can be simply stated as follows:

1. Whether or not oral statements tending to incriminate the petitioner in a criminal proceeding were taken under circumstances which met the requirement laid down in **Miranda v. Arizona**, 384 U. S. 459, 86 S. Ct. 1602, 16 L. Ed. 694, and

2. Whether or not a summary of petitioner's unsigned statements made to the police should have been admitted into evidence.

Counsel for the respondent, State of Tennessee, insists that the Court of Criminal Appeals of Tennessee properly resolved both of these issues favorably to the State holding that petitioner's rights under the Fifth, Sixth and Fourteenth Amendments, as contended by counsel for the petitioner in the petition for certiorari, were not violated.

EVIDENCE

Two parking meters for which petitioner was responsible was determined to have a shortage or deficit of $235.10 during a three-day period, August 2, 3, 4, 1967 . . . $74.90 on August 2; $78.50 on August 3, and $81.70 on August 4 (Tr. 63-69). The proof also showed that he took a little more than this amount but this additional amount was not counted.

It was a part of the petitioner's responsibility to collect the money from two coin boxes from the Promenade Parking Lot of Memphis, Tennessee, and turn it in to the City Treasury.

Because of a discrepancy in the amount of money turned in by the petitioner and the amount that was expected from the two boxes he handled, the police force investigated the matter. A representative of the police force went to the boxes on the three days in question about 6:00 a. m., unlocked the boxes, counted the money in each of them and then placed the money back in the boxes before petitioner arrived for work. The police then kept these boxes under surveillance to see that no other person had anything to do with the boxes other than the petitioner. The money was counted when turned in to the city treasury and the shortage stated above was ascertained by subtracting the money turned in from the two boxes from the total ascertained by the police earlier in the morning. It did not account for the money placed in the boxes by motorists using the lot between the time the boxes were checked at about 6:00 a. m. by the police and the time it was taken in by the petitioner.

The police also observed that loose coins were placed on top of the boxes and that the boxes could not be taken from their stands without disturbing these coins. The police each time, after checking the amount, carefully placed the loose coins back on top of the boxes as they had found them.

When the petitioner was arrested, he admitted to the police that he had over a long period of time kept for his own purposes some of the money that had accumulated in the meter money boxes for the city. He stated that he first began to take a small amount. He also told them he had spent some of it on slot machines in Mississippi (Tr. 74-76).

The State introduced evidence to show a big difference per month in the money turned in from the boxes over a six and one-half year period prior to the incident in question from that received per month immediately after petitioner's arrest. Petitioner collected the money during this period except when he was sick (Tr. 127).

The boxes were also checked for July 26, 1967, and a shortage of $74.65 was determined for that day (Tr. 70). This surveillance apparently continued through the remainder of July of that year with a similar result (Tr. 71-72).

ARGUMENT

It is insisted by counsel for the petitioner that the warning given him prior to being questioned by a member of the police force in Memphis, Tennessee, did not comply with the warning required in **Miranda**, supra, because it did not inform him that he was entitled to counsel at the time he was being questioned. The policeman's advice to the petitioner before questioning him was, "I advised him that he had the right to remain silent, and not make any statement, he had a right that anything he said could be used against him in Court and he had the right to have Counsel of his own choosing or Court appointed Counsel if he couldn't afford Counsel and that he had the right to Counsel before answering any questions we agreed to."

It is also insisted by the counsel for the petitioner that petitioner was questioned after the petitioner made it known to the interrogating officer he wanted an attorney. The circumstances cited in the petition refute this contention. At page 5 of the petition it was stated in effect that the petitioner requested permission to call an attorney after his arrest. He was permitted to call an attorney once by his own admission, and twice according to the police officer's testimony. Obviously if the petitioner had wanted counsel present during the time he was questioned there was no reason why he could not have had him, and certainly after the warning given by the police officer and the petitioner's conversation with his own attorney by telephone he must have known that he did not have to answer questions at all unless he wanted to answer them.

Of course the petitioner denies that he was given any warning, and further denied that he made any statement, and, further, he insists in this petition that he was abused by the police by being denied medical treatment; that he was subjected to "racial slurs and trickery", and other-

wise mistreated. The petitioner does not cite the record to substantiate these broad allegations and it is submitted that they are untrue.

In this State, as in most other jurisdictions, it is the province of the Court to first determine whether or not confessions are admissible after conducting a proper hearing for determining the truth of the conflicting stories surrounding the taking of a confession. The trial judge's finding in a matter of this sort is given the weight of a jury verdict, **Taylor v. State**, 180 Tenn. 62, 171 S. W. 2d 403, because the trial judge is in position to see the witnesses, notice their demeanor, and in better position to determine the truth of the matter than in an appellate court which does not have such an opportunity as the trial judge.

During the criminal trial the police officer who interrogated the petitioner produced a written, or typed summary of petitioner's statement tending to incriminate him. The summary was not signed by the petitioner. The policeman made the summary a part of his testimony on the witness stand. The introduction of this summary was objected to at the trial on the grounds that being in writing it would have greater weight than the oral testimony and, as counsel for the State of Tennessee understands the petition, this is the sole objection to the admission into evidence of the summary described above. Several cases from other state jurisdictions are cited in support of this position. Some cases decided by this Court are: **Burgett v. Texas**, 389 U. S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319; **Thompson v. Louisville**, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654, and **Irvin v. Dowd**, 366 U. S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751. The latter cases, that is those decided by this Court, are absolutely irrelevant to the issue. All of them deal with an entirely different subject, and counsel for the State does not accept the

decisions of other Supreme Courts of last resort as authoritative on the question, particularly since in this State such written exhibits are not taken by the jury when they retire into the jury room for deliberation. **Watkins v. State**, 216 Tenn. 545, 393 S. W. 2d 341.

The problem is very similar to that of allowing a juror to take notes on the testimony of witnesses or of a particular witness. A good many authorities have held this to be permissible and not reversible error even when the jury has had such notes present during their deliberation.

In 89 C. J. S., Trial, Sec. 456, page 80, it is said that:

> "If they do not thereby consume too much time, it is not improper for the jury to take notes of what is said, or occurs, during the trial."

In 53 Am. Jur., Trial, Sec. 851, page 623, it is said that:

> "Although the taking of notes may not be a commendable practice, yet it is not illegal, and a verdict will not be set aside because thereof where no prejudice to the parties resulted."

In Underhill on Criminal Evidence, Vol. II, Sec. 513, page 1291, it is said:

> "Jurors may, however, makes notes of the evidence, or the judge's charge and may consult these in the jury room.", and

in 154 A. L. R. 878, it is said:

> "While the propriety of allowing jurors to take notes during the course of a trial depends in some cases upon the surrounding circumstances, and while some courts have merely expressed doubt as to whether it is improper for jurors to so conduct themselves, it has generally been held or stated in other cases to be entirely proper for members of a jury to take

notes of the testimony or statements or arguments of counsel, either upon their own violation, or upon motion of counsel, particularly in the absence of any prejudice to the parties.

'Other courts have expressed the view that while the practice is not to be commended, it is a matter within the discretion of the trial court.' "

CONCLUSION

In view of all the foregoing, it is insisted by counsel for the State of Tennessee that the Court of Criminal Appeals of Tennessee fairly resolved the issue raised in this petition especially when viewed in light of the entire circumstances and that petitioner's rights under the Fifth, Sixth and Fourteenth Amendments, were not denied him, nor is counsel's statement to the effect that the Supreme Court of Tennessee has evidenced a clear misunderstanding of the spirit of the **Miranda** holding with respect to the interrogation of persons by police officers is inappropriate as well as inaccurate. (To support this position, counsel for the petitioner has recited **Monts v. State**, 218 Tenn. 31, 400 S. W. 2d 722, a case decided by the Supreme Court of Tennessee several months prior to the publication of the **Miranda** opinion.)

Respectfully submitted

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Certificate of Service

I, David M. Pack, Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of October, 1970, I served copies of the within Reply of State to Petition for Writ of Certiorari on James Daily Briggs, Petitioner, by mailing copies in duly addressed envelopes, postage paid, to counsel of record, namely, Honorable Louis R. Lucas, Attorney at Law, 525 Commerce Title Building, Memphis, Tennessee 38103, and Honorable James M. Nabrit, III, Attorney at Law, 10 Columbus Circle, New York, New York 10019.

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